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No. 06-472

In The

Supreme Court of the United States

ALEXANDER, KATHERINE, WILLIAM, and JAMES BERGMAN, by and through their parents and next friend, BRAD and LIBBY BERGMAN, et al.,

Petitioners,

v.

STATE OF KANSAS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Kansas school finance formula does the following:

(1) compels preferential funding for Respondents' schools because of their higher percentages of minority and ethnic students;

(2) mandates decreased funding for Petitioners' schools notwithstanding their worse learning conditions for scholastic improvement on standardized tests than the schools favored by the state;

(3) makes voluntary increased spending on local public education contingent upon an undefined *base* level of education;

(4) imposes judicially unmanageable standards of scholastic "need" as a new common law rule for allocating state revenue; and

(5) prohibits Petitioners from reducing the state-imposed funding deficits with their own money and local funds.

The State of Kansas, therefore, discriminates against Petitioners based upon race and other suspect classifications and deprives them of fundamental liberties protected by the Federal Constitution. For the reasons stated below, Petitioners present substantial federal questions and are "parties" for the purpose of appealing the lower court decisions which adversely adjudicated their federal rights and claims without notice or an opportunity to be heard:

Petitioners are "Parties" for the Purpose of this Appeal.

Petitioners' schools are in the bottom tier of all school districts in terms of per pupil operating expenditures–they are some of the poorest in the State. (*See*, Kansas State Board of Education's 2005-2006 Per Pupil Expenditures by District Statistics.)

Petitioners reside in Johnson County, Kansas which contributes the vast majority of tax revenue to the state for public education – 25.7% of the total – more than any other county by a significant margin. (*See*, County Comparison of Various State Tax Collections from the Kansas Department of Revenue's Annual Report for 2005.) Yet, Johnson County schools receive less than eight percent (8%) of the State's funding for public education. (*See*, Kansas State Board of Education's 2005-2006 Per Pupil Expenditures by District Statistics.) That is almost a three (3) to one (1) ratio of money contributed versus funding received.

The Kansas Rules of Civil Procedure governing intervention as of right are modeled after the Federal Rules of Civil Procedure. *Compare* K.S.A. 60-224(a) to Fed. R. Civ. P. 24(a). Petitioners satisfied each and every factor for intervention *of right*. Yet, the Kansas Supreme Court arbitrarily denied intervention. Respondents objected to Petitioners' intervention claiming that Respondents alone spoke for all Kansas school children and, therefore, adequately represented Petitioners' interests in the subject matter of the litigation.[1]

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[1] *See* Respondents' June 15, 2006 Response to Motion to Intervene filed in the Kansas Supreme Court and their Response to Motion to

(Continued on following page)

Yet, Respondents state the exact opposite to this Court. Respondents now admit they never adequately represented the interests of Petitioners and were adverse to Petitioners' interests all along.[2] This judicial admission alone demonstrates the impropriety of the Kansas Supreme Court's denial of Petitioners' intervention.[3]

While Respondents rely on *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), that case is distinguishable. The petitioners in that case chose not to seek intervention; whereas, these instant Petitioners here did move to

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Intervene filed in the United States District Court for the District of Kansas as Dkt. No. 239, p. 2 ("The Applicants do not have a right to intervene . . . because their interests are adequately represented by existing parties. . . . Applicants argue their interests diverge from plaintiffs' since they challenge different components of the school funding scheme . . . however . . . their objective remains to find [the statute] unconstitutional . . . therefore, the presumption arises that the plaintiffs adequately represent Applicants' [petitioners'] interests. . . . Applicants and plaintiffs may attack different components of the scheme under different theories, but they both share the ultimate goal of equitable and adequate school funding for all Kansas students.").

[2] Opposition Brief at 11 ("Respondents never took on the burden of representing all Kansas school children. In fact, Respondents advanced many positions that were adverse to the interests of many school districts in the state."). Respondents inconsistently also now seek attorneys' fees under 42 U.S.C. § 1988 in federal court for allegedly prevailing on, in effect, federal questions before the Kansas Supreme Court in *Montoy*. They cannot have it both ways.

[3] The Motion to Intervene filed by Kansans for Separation of School and State was denied by the Kansas Supreme Court because that group's opposition to any tax increase for additional school funding was adequately represented by the State defendants who similarly opposed any tax increase. Also, a year prior to Petitioners' Motion to Intervene, the Shawnee Mission Unified School District No. 512 moved to intervene, but on 7/7/05, the court also summarily denied intervention without opinion. **Moreover, Petitioners' Motion to Intervene was filed within the expedited time frame for briefing ordered by the court.**

intervene. *Id.* at 303. The Kansas Supreme Court, however, *forbid* Petitioners from intervening. In *Marino*, this Court specifically stated that when nonparties learn their interests in the litigation are not adequately represented, "the better practice is for such nonparties to seek intervention for purposes of appeal; denials of such motions are, of course, appealable." *Id.* at 304. Petitioners did exactly as this Court instructed. Accordingly, the denial of their motion to intervene is directly appealable to this Court and is subject to *de novo* review on the merits.

Moreover, in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), this Court stated, "we have never restricted the right to appeal to named parties to the litigation." *Id.* at 7-8. Just as witnesses who were held in contempt were entitled to appeal even though they were not parties; so, here too, **Petitioners may appeal not only the Order denying intervention, but the other adverse decisions similarly binding and directly harming them**. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988). Like a contempt order, the Kansas Supreme Court's remedial orders actually penalize Petitioners for living in a property-rich area and attending public schools with lower percentages of minority and ethnic children. *See*, *Gratz v. Bollinger*, 539 U.S. 244 (2003); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1988).

This is an even better case than *Devlin* for permitting an appeal because in *Devlin* the dissenting Justices were reluctant to permit an appeal when the Petitioners had not properly moved to intervene *and* had resisted the invitation to intervene. *Id.* at 20-21, n.4. In contrast, instant Petitioners did try to intervene.

Moreover, for all intents and purposes, this litigation functioned as a class action. The Kansas Supreme Court itself acknowledged that its decision, "would have statewide effect." (App. 83-84.) This was public interest litigation, not a private dispute. Plaintiffs purposefully excluded Petitioners to pursue a redistributive theory of justice detrimental to Petitioners' interests. Accordingly, Petitioners were denied due process because they were denied access to the courts to petition their grievance while their interests in the subject matter of the litigation were adjudicated to their detriment. *Missouri v. Jenkins* (*Jenkins I*), 495 U.S. 33, 66 (1990) ("[T]he exercise of judicial power involves adjudication of controversies and imposition of burdens on those who are parties before the court. The order at issue is not of this character. It binds the broad class of all KCMSD taxpayers. It has the purpose and direct effect of extracting money from persons who had had no presence or representation in the suit. For this reason, the District Court's order imposing a tax was more than an abuse of discretion, for any attempt to collect the taxes from the citizens would have been a blatant denial of due process."); *Spallone v. U.S.*, 493 U.S. 265 (1990) (Court imposed sanctions against nonparty councilmen for constitutional violation was excessive remedy which deprived nonparties of procedural due process. The remedial orders here are far more manipulating and corrupting to the legislative and judicial process than those struck in *Spallone* because here the Petitioners are *innocents*.)

Federal Questions Are Properly Presented.

Howell v. Mississippi, 543 U.S. 440 (2005) also is inapposite. Unlike *Howell*, where the federal claim neither was "addressed by" the state court nor "properly presented

to the state court that rendered the decision," here Petitioners did raise specific federal claims, cited relevant federal constitutional provisions, and discussed specific federal case law in their Motion to Intervene. (*See* App. 105-126, excerpts from Motion to Intervene attached hereto.) The fact that the Kansas Supreme Court denied the Motion to Intervene without opinion does not change the fact that the federal questions were raised.

Most importantly, in *Pruneyard Shopping Center v. Robins*, 474 U.S. 74, 79-80, 86, n.9 (1980), this Court expressly stated, "federal claims [are] adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law or revises its prior interpretation." *Id.* at 87, n.9 (citations omitted). That is exactly what happened in this case. Pet. for Cert., pp. 7, 10. Therefore, the federal questions upon which Petitioners seek review were adequately pressed below.[4]

The Kansas Supreme Court also actually decided federal questions when it rejected the federal equal protection claim decided *sua sponte* by the trial court. App. 84. Petitioners contend this judgment is erroneous and misapplies this Court's precedent. At bottom, this is a constitutional "floor" and "ceiling" case which requires strict

[4] In any event, Respondent, the State of Kansas, raised related federal questions in its Motion to Lift the Stay wherein the State argued the Kansas Supreme Court's remedial order violated the Fourteenth Amendment as well as Article IV, § 4 of the Federal Constitution and cited federal case law in support of its motion. On 9/21/05, the court summarily denied the motion. *Pruneyard Shopping Center v. Robins*, 474 U.S. 74, 79-80 (1980).

scrutiny, not a rational relations test. *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50, n.107, 67 (1973).[5]

In *Papasan v. Allain*, 478 U.S. 265 (1986), this Court distinguished disparities in funding for public education which arise as a result of varying wealths of geographic areas and *disparities which arise as a result of intentional decisions by the State to allocate unequal funding* to different school districts. Under the Federal Constitution, the former is constitutional; the latter more often is not.

The Kansas Supreme Court, however, came to the opposite conclusion holding that local property taxes were "inequitable" and as such, impermissible even though they were constitutional. App. 7, 63, 69. They cannot be "equal" and yet "inequitable" at the same time – a contradictory and nonsensical result. **Can a state court use its equity power to trump the Federal Constitution?** The Supremacy Clause should prohibit the state court engrafting onto the state constitution a meaning of "suitable" inconsistent with the meaning of "equal protection of the laws" in the Fourteenth Amendment. *Honda v. Oberg*, 512 U.S. 415 (1994); *Cooper v. Aaron*, 358 U.S. 1 (1958) (the constitutional rights of children not to be discriminated against in public schools on grounds of race or color can neither be nullified openly and directly by state legislators, state executives, or judicial officers nor nullified indirectly by them through evasive schemes).

The Kansas Supreme Court specifically discussed and cited as authority this Court's seminal case, *Marbury v.*

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[5] To be clear, Petitioners do not contend education is a fundamental right; rather, other fundamental rights are being deprived. *See* App. 105-126.

Madison, 5 U.S. (1 Cranch) 137 (1803). However, the Kansas Supreme Court reads too much into *Marbury*. While it may be true that "the judiciary's sworn duty includes judicial review of legislation for constitutional infirmity" (App. 51), it does not follow that a state court's remedial power is unlimited as the Kansas Supreme Court's decisions suggest:

> Moreover, unlike federal courts, state courts need not be constrained by federalism issues of comity or state sovereignty when exercising remedial power over a state legislature, for state courts operate within the system of a single sovereign. . . . Nor should doubts about the court's **equitable power** to spur legislative action or to reject deficient legislation impede judicious oversight. (App. 54) (emphasis added.)

The logical conclusion of the court's foregoing argument is that a state court's "equitable" remedial power is unlimited – having determined a constitutional violation exists, the state court's "equitable power" to remedy the violation has no bounds. On the contrary, that would necessarily mean a state court's remedial discretion can function as an end-run around the Federal Constitution. *Missouri v. Jenkins* (*Jenkins I*), 495 U.S. 33, 55 (1990) ("We have emphasized that although the remedial powers of an equity court must be adequate to the task . . . they are not unlimited. . . ."); *Missouri v. Jenkins* (*Jenkins II*), 515 U.S. 70 (1995) (This Court questioned the legitimacy of a district court's attempt to remedy "white flight" which was not itself an unconstitutional condition. Thus, is the "achievement gap" a similarly multifaceted, sociological and demographic phenomenon, not an unconstitutional condition?).

The court never specifies the degree of tailoring between legislative ends and means required to fulfill the court's new common law "equity" or "actual cost" rules for school finance. Although the court states it uses the legislature's "own definition of suitable education," this definition is inappropriate for construing the meaning of "suitable provision for the finance of the educational interests of the state" in the state constitution. K.S.A. 2003 Supp. 46-1225(e). It cannot be considered the definition of a "minimally adequate" education when it includes items and activities not even subject to the state's standardized assessments. Standardized testing is the very basis for the "achievement gap", and the "achievement gap" is the alleged constitutional wrong for which the court crafted its discriminatory and confiscatory "equitable" remedy. Indeed, during oral argument, some justices rightly observed that the Augenblick & Myers cost study did not compile actual costs of a *basic* education, but, instead, compiled *assumed* costs of an *ideal* education.

The court also employed another judicially unmanageable standard: "[the] focus must be on *needs* and the appropriate costs thereof." App. at 75 (emphasis added.) Does the court thereby incorporate a Marxist-Leninist political philosophy into constitutional adjudication: "From each according to ability to each according to need?" This new common law rule is frightening given the Federal Constitution's protection of political freedom. "Need" simply is too vague and indefinite to be judicially manageable and, as such, invites inaccurate and arbitrary adjudication. *Honda*, 512 U.S. at 430-431.

Neither the Kansas Supreme Court nor the legislature has yet defined *the appropriate conditions of learning* for a

foundational level of education.[6] Without this definition, the "actual costs" of that mythical level of education are meaningless. The court has set in motion, therefore, a system of ad hoc rulemaking by which any judicial decree from this point forward will be *ex post facto* in nature and, as such, arbitrary. The Kansas school finance formula and the decisions below, therefore, violate petitioners' First and Fourteenth Amendment rights. These are federal questions which were properly "pressed" to the court below but nonetheless were ignored. As such, federal jurisdiction in this court is proper. *U.S. v. Williams*, 504 U.S. 36 (1992); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (where state's adjudicative procedures violated Federal Constitution, this Court's jurisdiction to review those procedures is proper).

CONCLUSION

For the reasons stated in the Petition and herein, the Petition for Certiorari should be granted. In the alternative, this Court should vacate the January 3, 2005, June 3, 2005, and July 28, 2006 decisions, reverse denial of the Motion to Intervene, grant Petitioners' intervention, and remand the case for further proceedings consistent with this Court's opinion.

[6] Petitioners contend that on the record before the Kansas Supreme Court, a proper definition of a minimally adequate education to which all children in Kansas would be entitled, i.e. the constitutional "floor", was available for the court's consideration, but the court refused to entertain it, e.g., comparable teachers teaching the core curriculum (as defined by K.S.A.72-6439(b)) in comparable small class sizes. The core curriculum is subject to standardized testing. ("The State Board of Education shall provide for assessments in the core academic areas of mathematics, science, reading, writing, and social studies.")

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B. Applicants Seek to Make Specific Constitutional Claims which Demonstrate That They Have A Substantial Interest in the Subject Matter of this Pending Action.

1. Equal Protection Analysis.

In 1973, the United States Supreme Court decided *San Antonio Sch. Dist. v. Rodriguez,* 411 U.S. 1 (1973), which held that public education was not a fundamental right under the federal constitution and that wealth was not a suspect classification. As a consequence, the Court rejected an equal protection and due process challenge to Texas' statutory school finance scheme for public education which, like Kansas, funded K-12 public education with state and local taxes. However, the Court did recognize that one constitutional challenge to a state's system of funding public education could be successfully asserted, but the plaintiffs in that case had not done so. In his dissenting opinion, Justice White articulated what would constitute a proper constitutional challenge under the federal constitution. Specifically, Justice White stated that he believed a state's ceiling on local taxation presented a federal constitutional question for under funded schools. As he observed,

> But state [Texas] law places a . . . **ceiling** on the . . . tax rate, a limit that would surely be reached long before Edgewood (the plaintiff school district) attained an equal yield [to other school districts]. Edgewood is thus **precluded in law, as well as in fact, from achieving a yield even close to that of some other districts.**

Rodriquez, 1 U.S. at 67. Like Edgewood, the Shawnee Mission and Blue Valley school districts are under funded by the state in terms of per pupil operating expenditures.

Like Texas' ceiling on local taxation criticized by Justice White, so Kansas' ceiling on the local option budget similarly prevents the Shawnee Mission and Blue Valley School districts "in law, as well as in fact, from achieving a yield even close to some other school districts." *Id.* Even with the money generated from the local option budget combined with the money from the state, the total combined money for Shawnee Mission and Blue Valley schools still is below the average total funding for all school districts in Kansas for classroom instruction.

In response to Justice White's observation, the majority acknowledged that state caps on local taxation would indeed present a constitutional question:

> Mr. Justice White suggests in his dissent that the Texas system violates the Equal Protection Clause. . . . He places special emphasis on the statutory provision that establishes **a maximum (local tax) rate** . . . at which a local school district may tax for school maintenance. . . . [However] Appellees do not claim that the **ceiling** presently bars *desired tax increases* in Edgewood or in any other Texas district. Therefore, the constitutionality of that statutory provision is not [yet] before us, and **must await litigation in a case in which it is properly presented.** 1 U.S. at 50, fn. 107, *citing, Hargrave v. Kirk,* 313 F. Supp. 944 (M.D. Fla. 1970), *vacated,* 401 U.S. 476 (1971) (emphasis added).

While the Texas Edgewood plaintiffs did not claim that the ceiling on local taxation prevented "desired tax increases" to improve local public education, Applicants do make this very constitutional challenge to the Kansas lid on local taxation.

As the Court in *Robinson v. Cahill,* 303 A.2d. 273, (N.J. 1973) stated, "The [Rodriquez] majority of course did not say there could never be a successful equal protection attack. . . . Indeed, in footnote 107, the majority speaking of Mr. Justice White's dissent, recognized that if a statute imposed a ceiling which barred desired tax increases in a district, there would be an arguable issue, the majority referring to *Hargrave v. Kirk, . . .*" *Id.* at 488.

In *Hargrave v. Kirk,* 313 F. Supp. 944 (1970), a federal three-man court held that a Florida statute which imposed a ceiling on local taxation for public schools did indeed violate the 14th Amendment's guarantee of equal protection of the laws. In so holding, the Court stated:

> The State may not grant a benefit subject to a condition which violates the Equal Protection Clause. *See Sherbert v. Verner,* 1963, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965; *Keyvishian v. Board of Regents of New York,* 1967, 385 U.S. 589, 605-06, 87 S. Ct. 675, 17 L. Ed. 2d 629. . . . what interest has the State of Florida in preventing its poorer counties from providing as good an education for their children as its richer counties? As postulated by the plaintiffs, 'The legislature says to a county, 'you may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do:
>
> We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act. While the state undoubtedly has a valid interest in preserving the fiscal integrity of its programs, and may legitimately attempt to limit its expenditures for public education, or any other purpose, it may not

accomplish such a purpose by invidious discrimination between classes of its citizens.' *Citing, Shapiro v. Thompson,* 1969, 394 U.S. 618, 633, 89 S. Ct. 1322, 1330, 22 L. Ed. 2d 600. . . . The Florida Act prevents the local Boards from adequately financing their children's education. The complaint is not that the state permits the Boards to spend less, but that it *requires* them to spend less. Plaintiffs are asking to be able to raise more money locally. . . . we know that there will continue to be disparities in per pupil expenditures in Florida, either because some counties may not desire to spend as much as other counties on the education of their children, or because, in the poorer counties, they cannot. Plaintiffs do not contest the variations in per pupil expenditures from these causes, but only 'the unequal impediment placed on us by the state. . . . Unlike the broad relief sought [in other cases], the remedy here is simple – an injunction against state officials from taking any action because of a county's refusal to limit its taxes to ten mills [the state ceiling] imposed by the Act. . . . The granting of this relief will give the disadvantaged counties authority to raise their taxes above the ten mill limit [the State cap].

. . . . Thus, our judgment holding the Act unconstitutional will not interfere at all with the state's fiscal affairs and operations, nor will it interfere with the orderly and effective operation of the schools or the assessment and collection of taxes. . . . For the reasons we have outlined, we hold that the Millage Rollback Act [Florida's ceiling on local taxation] – which required as a condition of participation in the State's Minimum Foundation Program that a county board of public instruction; shall levy no more than ten mills

> of tax' . . . are unconstitutional. The plaintiffs' Motion for Summary Judgment is granted and the defendants are enjoined [from imposing the cap on local taxation or penalizing any local board for raising local funds beyond the state's ceiling]. *Id.* at 947-950 (emphasis added).

Although the United States Supreme Court vacated that three-man court's judgment on procedural grounds, in *Rodriguez,* the Court acknowledged the merits of the *Hargrave* court's analysis on the equal protection claim with respect to the ceiling on local taxation for public education. 411 U.S. 50 at fn. 107. In *Kirk v. Hargrave,* 401 U.S. 476 (1971) the Court held that the lower federal court should have waited until the companion state case had run its course and resolved the issue of adequate funding on state law grounds. As the *Robinson* v *Cahill* court observed,

> *Askew v. Hargrave,* 401 U.S. 476, 91 S. Ct. 856,28 L. Ed. 2d 196 (1971), recognizes a potential for an equal protection complaint in this area. There the Florida Statute provided that no state aid for education could be had if the ad valorem tax levied in a county for education exceeded a stated millage rate. A three-man court found the **restriction . . . irrational, noting that it 'prevents the local boards from adequately financing their children's education.'** *Hargrave v. Kirk,* 313 F. Supp. 944, 949 (M.D. Fla. 1970). . . . The Supreme Court vacated the judgment saying the federal court should abstain until a pending attack in the state courts on state grounds is resolved. . . . *Robinson,* 303 A.2d 273, fn. 2 (1973).

In contrast, however, the constitutionality of the Kansas school finance formula and, in particular, the cap on the local option budget is ripe for review in this Court.

2. First Amendment Analysis.

The Kansas legislature's purpose in setting a ceiling on local taxes for improving public education is allegedly to equalize funding among school districts throughout the state for public education. The public policy rationale is that wealthier school districts should not be able to access more funds for their children's education than poorer school districts.[1] However, in *Buckley v. Valeo,* 424 U.S. 1 (1976), the United States Supreme Court rejected government imposed spending caps for similar egalitarian purposes as unconstitutional deprivations of liberty under the First amendment of the federal constitution. In that case, Congress had imposed similar spending caps on the amount of money that could be spent on political campaigns to similarly try to equalize the relative financial ability of candidates running for public office. Congress did not believe it was fair for wealthier candidates to be able to spend more money for political campaigns than could relatively poorer candidates. Congress believed that

[1] It is important to note that according to the official statistics of which this Court may take judicial notice, the Kansas cap on the local option budget prevents school districts with low, not high, per pupil revenue from achieving equality, not superiority, with other school districts in the State. Therefore, the alleged purpose of the ceiling is not even applicable to the facts of this case. In any event, even if the per pupil expenditures for Blue Valley and Shawnee Mission were the same *as,* or even higher than, other school districts, the ceiling still would be unconstitutional for the reasons articulated in *Buckley as* discussed above.

wealthier candidates have an unfair advantage over relatively poorer candidates and wanted to prevent such unfair advantages. Thus, Congress imposed a ceiling on expenditures for political campaigns to equalize campaign finance among candidates. The United States Supreme Court rejected the expenditure caps as unconstitutional under the First Amendment.

The Court detailed the fundamental First Amendment freedoms at stake with respect to the campaign expenditure caps:

> Discussion of public issues . . . [and] debate are integral to the operation of the system of government established by our Constitution. . . . The First Amendment affords . . . protection . . . to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people . . . . This no more than reflects our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . . **In a republic where the people are sovereign:, the ability of the citizenry to make informed choices . . . is essential. . . .** (424 U.S. at 14-15; 96 S. Ct. at 632,633, *citing Roth v. U.S.*, 354 U.S. 476, 484 (1957); *Winters v. New York*, 333 U.S. 507, 510 (1948); *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (emphasis added).

The Court also noted that the idea of collective action to enhance public debate was preservative of the fundamental individual liberties protected by the First Amendment. In so holding, the Court stated,

> The First Amendment protects political association as well as political expression. The constitutional right of association explained in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), stemmed from the Court's recognition that '**effective advocacy** of both public and private points of view, . . . is undeniably **enhanced by group association**. . . . 424 U.S. at 14-15; 96 S. Ct. at 632-633, *citing Kusper v. Pontikes*, 414 U.S. 51, 56, 57 (1973); *quoted in*, *Cousins v. Wigoda*, 419 U.S. 477, 487 (1975) (emphasis added).

It is with these "fundamental rights" and "principles" in mind that the Court evaluated the governmental "limitations upon the giving and spending of money in political campaigns." *Id.* Opponents of the campaign finance caps contended the ceilings on contributions and expenditures were at the core of political speech and that the Act's limitations were thus restraints on First Amendment liberty that were both gross and direct; whereas, proponents of the spending caps argued the caps merely regulated conduct, not speech, and, in any event, any effect on speech and association was incidental to First Amendment freedoms. 424 U.S. at 16-17; 96 S. Ct. at 633-34. The Court rejected the categorization of the spending caps as merely regulating conduct, not speech. In so holding, the Court stated:

> The interests served by the Act include restricting the voices of people and interest groups who have the money to spend and reducing the overall scope of federal election campaigns. Although the Act does not focus on the ideas expressed by persons or groups subject to its regulations, it is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression

> by citizens and groups. 424 U.S. at 17; 96 S. Ct. at 634 (emphasis added).

Thus, the Court recognized that a spending cap did not itself prevent citizens or candidates from actually speaking and exercising their right to free speech; however, the spending caps' interference with the people's ability to spend their own money for the purpose of enhancing communication between the electorate and those running for public office did trigger fundamental First Amendment freedoms. The fact that the government was not actually regulating the content of what was said was no matter. The point was an uninhibited, wide-open, robust marketplace of ideas was compromised by such expenditure caps. *See Keyishian v Board of Regents of Univ. of New York*, 385 U.S. 589 (1967) (discussing public education as a locus for the uninhibited, wide open, robust marketplace of ideas deserving First Amendment protection).

The United States Supreme Court condemned the notion that the government could cap campaign expenditures to equalize the relative ability of less wealthy candidates to effectively campaign for public office. The Court held that campaign expenditure limitations which prohibited spending money on political campaigns beyond a certain level violated the First Amendment. In declaring these expenditure ceilings unconstitutional, the Court stated:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy . . . imposed by [the] expenditure ceiling. **But the concept that**

> **government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. which was designed to secure the widest possible dissemination of information** from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. 424 U.S. at 48-49; 96 S. Ct. at 649, *citing NIT v. Sullivan*, 376 U.S. at 266, *quoting Associated Press v. United States*, 326 U.S. 20, and *Roth v. United States*, 354 U.S. at 484 (emphasis added).
>
> **[T]he 1st Amendment [does not] permit Congress to abridge the rights of some persons to engage in political expression in order to enhance the relative voice of other segments in our society . . . *Id.***

In short, "The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise. In the free society ordained by our Constitution, it is not the government, but the people, individually as citizens . . . and collectively as associations . . . who must retain control over the quantity and range of debate on public issues. . . . " 424 U.S. at 57-58; 96 S. Ct. at 653.

Just as the core issue for the Court in *Buckley v. Valeo* was who should control the quantity of information in political campaigns, the government or the people; so, the issue of control is at the heart of the constitutionality of the cap on local taxation for public education. Just as the First Amendment prohibited the national government from limiting the overall quantity of debate in *Buckley v.*

Valeo; so, in *Montoy*, the First and Fourteenth Amendments similarly should prohibit state governments from limiting and controlling the quantity of education any community's children can obtain. The people, acting through their local school board, should decide the maximum level of education they can afford, not the state.

Indeed, in *DeRolph v State*, 78 Ohio St. 3d 193, 211, 677 N.E.2d 733 (1997), a school finance case, the Ohio Supreme Court stated that its "decision should not be construed as imposing spending ceilings on more affluent districts. School districts are still free to augment their programs if they choose to do so." The Ohio Supreme Court's statement, of course, begs the question: are school districts, and in particular, the parents and residents residing within those school districts, in fact, "free" under the state and federal constitutions to choose to spend their own money on their own children's public education to enhance the level of education they receive? The Kansas cap on local taxation suggests not. However, importantly, *Rodriquez*, *Hargrave*, and *Buckley*, suggest the United States Supreme Court would strike down State caps as unconstitutional under the First Amendment as well as under an equal protection analysis if given the chance to do so.

3. Substantive Due Process Analysis.

In *Moore v. East Cleveland*, 431 U.S. 494 (1977), the United States Supreme Court invalidated a local ordinance on substantive due process grounds because the state regulation prohibited a grandmother from using her own property to house her grandchildren. In so holding, the Court found the state regulation unduly interfered

with "property" and "liberty" interests protected from such state encroachment under the 14th Amendment. Almost twenty (20) years later, in *Nixon v. Shrink*, 528 U.S. 377 (2000), the United States Supreme Court struck down state-imposed spending caps on political campaigns as unconstitutional under the First Amendment. In a concurring opinion, Justice Stevens wrote that he would invalidate expenditure caps as unconstitutional under a substantive due process analysis. Relying on *Moore v. East Cleveland*, he stated,

> Our constitution and our heritage properly protect the individual's interest in making decisions about **the use of his or her own property**. Governmental regulation of such decisions can sometimes be viewed either as 'deprivations of liberty' or as 'deprivations of property.' *Nixon v. Shrink*, 528 U.S. 377, 398-399, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000) (Justice Stevens concurring), *citing Moore v. East Cleveland*, 431 U.S. 494, 513, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (emphasis added).

For the reasons stated by Justice Stevens in Nixon and the United States Supreme Court in Moore, the Kansas cap on expenditures for public education is unconstitutional under a substantive due process analysis because the cap unduly interferes with the fundamental rights of citizens to spend their own money on something they value, i.e., improvement of their children's local public education. In the words of Justice Stevens, the cap on the local option budget would constitute a "[g]overnmental regulation . . . [which] can . . . be viewed either as 'deprivations of liberty' or as 'deprivations of property.' *Nixon*, 528 U.S. at 398-399, *citing Moore v. City of Cleveland*, 431 U.S. 494, 513 (1977). *See also*,

Meyer v Nebraska, 262 U.S. 390 (1923) (parents have a fundamental substantive due process right to provide foreign language instruction to their children, and the state is prohibited from impinging on that liberty interest); *Pierce v Society of Sisters*, 268 U.S. 610 (1925) (state law compelling enrollment in public schools as opposed to private or parochial schools is unconstitutional as an undue interference with parents' fundamental right to liberty with respect to upbringing of their children); *Zelman v. Doris Simmons-Harris et al.*, 336 U.S. 639 (2002) (state programs providing tuition aid in the form of vouchers for some students to attend public or private school is constitutional because it furthers parents' freedom of choice for the education of their children); *Lujan v Colorado State Bd. Of Educ.*, 649 P.2d 1005, 1023 (Colo. 1982) ("parents have inherent civil right to exercise control over the education of their children"); *Thompson v. Engelking*, 537 P.2d 635, 645 (1975) ("[T]he Little Red School House became an American institution, the center of community life, and a pillar in the American conception of freedom in education and in local control of institutions of local concern").

Accordingly, Applicants seek to assert a substantive due process claim as well with respect to the unconstitutionality of the Kansas' school finance formula, as amended by S.B. 549, which is the "property" or "transaction" which is "the subject of the [pending] action." K.S.A. 60-224(a).

4. Procedural Due Process Analysis.

As argued herein, Applicants have a right to be involved as parties in this action. Any remedy this court

fashions will impact Applicants. Indeed, Applicants respectfully submit that with respect to the Kansas Supreme Court's continuing stay of the local funding provision known as the Cost of Living Weight, this Court exceeded its remedial discretion and adversely impacted Applicants' interests and rights. Any continuation of the state's cap on the local option budget or restriction on local funding for public education by the legislature or this Court would violate Applicants' 14th Amendment due process rights. For these reasons, Applicants want to be involved in this proceeding to defend their interests and make their constitutional claims with respect to SB 549 while this Court is considering the constitutionality of SB 549 and fashioning a remedy.

A. The Common Law "Inherent Equitable" Limits on Judicial Remedial Power Made Applicable to State Courts Through the 14th Amendment's Due Process Guarantee – the Jenkins I and II Tests.

In justifying this Court's June 3, 2005 and July 8, 2005 remedial decrees, the Kansas Supreme Court stated the following:

> Nor should doubts about the court's **equitable power** to spur legislative action or to reject deficient legislation impede judicious oversight. An active judicial role in monitoring remedy formulation is well-rooted in the court's **equitable powers**. As long as such power is exercised only after legislative noncompliance, it is entirely appropriate. *Citing* Note, "Unfulfilled Promise: School Finance Remedies and State Courts," 104 Harv. L. Rev. 1072, 1087-88 (1991) (emphasis added).

The logical conclusion of the Court's foregoing argument is that the Court's "equitable" remedial power is unlimited – having determined a constitutional violation exists, the Court's "equitable power" to remedy the violation has no bounds. On the contrary, to so interpret the federal constitution and the applicable United States Supreme Court precedent would necessarily mean a state court's remedial discretion can function as an end-run around the federal constitution entirely and that a state court could violate the federal constitution at will so long as it did so while exercising its remedial authority.

The Court's arguments regarding the nature and scope of the Court's remedial powers ignore applicable limitations on its remedial power. The federal Constitution imposes an "inherent equitable limitation" on a state court's remedial "equitable power" through the Due Process Clause of the 14th amendment. Since this limit on judicial power is "inherent" in the concept of judicial authority within a democratic form of government, judicial remedial authority necessarily becomes usurpatious, undemocratic and arbitrary when a court's "equitable power" is exercised without due regard for these common law limitations. When this happens, due process guarantees of the 14th amendment are impinged and a federal question is triggered.

In *Missouri v. Jenkins (Jenkins I)*, 495 U.S. 33 (1990) the United States Supreme Court held that the lower federal court abused its discretion in fashioning a remedy to end segregation in the Kansas City Missouri School District ("KCMSD") when that lower court directly imposed a tax increase on Kansas City, Missouri citizens. The trial court in that case had decided that a court-imposed tax increase, while an albeit extraordinary remedy, was

nevertheless a proper exercise of the court's remedial discretion to correct the constitutional violation.

The United States Supreme Court disagreed, finding that the trial court had exceeded its remedial power. The Supreme Court explained that the trial court's direct tax increase on Kansas City citizens violated the equitable doctrine restricting judicial remedial power because the order increasing taxes was more obtrusive to democratic governance than an order enjoining the state's cap on local taxation for public education. In other words, the least restrictive remedy would have required the court to first empower and direct the local school district to tax itself **beyond the level of the state cap on taxation**. "Permitting the school board to set the tax levy itself would minimize disruption of state laws and processes and would ensure maximum consideration of the views of state-local officials." *Id.* at p. 43. In so holding, the Court stated:

> In assuming for itself the fundamental and delicate power of taxation, the District Court not only intruded on local authority but circumvented it altogether. Before taking such a drastic step, the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task." Id. at 51 (emphasis added).

Thus, in addressing the equitable limits on a court's remedial powers, the court said:

> We have emphasized that although the remedial powers of an equity Court must be adequate to the task . . . they are not unlimited . . . [*citing Whicomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858 (1971)], one of the most important limits on a court's exercise of equitable power is a proper

> respect for the integrity and function of local governmental institutions. Especially is this true where, as here, those institutions are ready, willing and able, but for the operation of state law, to remedy the deprivation of constitutional rights themselves. *Id.* at 55 (emphasis added).

So, here too, in *Montoy*, the residents of the school districts who would benefit from the local funding provisions are ready, willing and able to pay a tax increase above and beyond the spending cap on the local option budget to achieve parity with other school districts that have higher per pupil operating expenditures – to similarly improve the quality of education in their school districts.

As the Supreme Court concluded, the less intrusive remedy to democratic governance is enjoining the cap on local taxation. ("Here, the KCMSD may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of an obligation imposed on the KCMSD by the Fourteenth Amendment. . . . State policy must give way when it operates to hinder vindication of federal constitutional guarantees" 495 U.S. at 55.)

The same equitable limitation on judicial remedial discretion is applicable to this Court in this case. According to the United States Supreme Court, the Fourteenth Amendment compels an equity court, any equity court, state or federal, to first enjoin the state's cap on local taxation before it can order more expansive remedies. In staying the Cost of Living Weight, the Kansas Supreme Court chose an illogical and excessive remedy. By withholding the local funding provisions, it further reduced overall funding for public education which the Court already held was constitutionally inadequate – a seemingly nonsensical result. In doing so, it exceeded its

authority to an even greater extent than did the federal district court in *Jenkins*. Withholding the local provisions only hurts the at risk, bilingual, and special education children in the Non-Party districts – the very category of children the Court says it is trying to help. Staying the local funding provisions does not help the plaintiff school districts, but it does hurt the school districts and school children enrolled in those districts who stand to benefit from those provisions – statutory provisions the Court found to be constitutional.

B. The Common Law "Inherent Equitable" Limits on Judicial Remedial Power Made Applicable to State Courts Through the 14th Amendment's Due Process Guarantee the *Honda* Test.

Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415 (1994) provides additional guidance for this Court with respect to dissolving its stay of the Cost of Living Weight. Honda involved the United States Supreme Court's review of a state court's interpretation of a state constitutional amendment on 14th Amendment procedural due process grounds. The Court effectively reviewed the manner in which the Oregon Supreme Court rendered its decision. The Court concluded that as interpreted by the Oregon Supreme Court, the Oregon constitutional amendment regulating imposition of punitive damages in civil personal injury cases violated the 14th Amendment's guarantee of procedural due process because the state constitutional amendment invited arbitrary decision making by juries. The Oregon Supreme Court's interpretation of the state constitution, therefore, deprived the citizens of Oregon of a federal constitutional right, i.e. procedural due process.

The interesting question about Honda for this case, therefore, is how the Supreme Court departed from its traditional deference to state court interpretations of a state's own constitution.

While the Oregon constitutional amendment to the state constitution merely allocated fact – finding power to juries in civil disputes and therefore did not itself violate the federal Constitution on its face, the Supreme Court held that, as applied by the Oregon Supreme Court, the constitutional amendment violated the 14th Amendment of the federal constitution by allowing unrestrained juror discretion, divorced from common law limitations on remedial discretion.

In this case, Applicants submit that the interpretive procedures and reasoning employed by this Court in construing Article 6 of the Kansas Constitution departs from traditional equitable doctrines governing legitimate adjudication, just as Oregon's highest court in *Honda* departed from traditional equitable doctrines limiting remedial discretion. As the United States Supreme Court stated, "What we are concerned with is the possibility that a culpable defendant may be unjustly punished . . . Oregon's abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that its procedures violate the due process clause." *Honda*, 512 U.S. at 429-430. The Court stated in no uncertain terms: "When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." (emphasis added). *Honda*, 512 U.S. at 430-431. Similarly, the July 8, 2005 remedial decree in this case fails to comply with the traditional common law equitable doctrine limiting a

court's remedial discretion to the least obtrusive means to democratic governance to remedy the constitutional wrong. This absent procedure would "provide protection against arbitrary and inaccurate adjudication."

The equitable common law doctrine restricting a judicial remedial decree to the least restrictive means to remedy the alleged constitutional wrong would not have permitted the Court to stay all local funding, a means not causally related to the court's alleged end. Local funding is not harmful to the plaintiff school districts and is beneficial to other school districts that need additional funding for public education to achieve per pupil expenditures comparable to those enjoyed by a majority of other school districts in the state. Staying local funding therefore is an excessive and arbitrary remedy.

Applicants disagree, however, with the Legislative Coordinating Council's argument that this Court cannot order the legislature to fund education at any specific level because that is the exclusive province of the legislature and to do so would violate Article IV, Sec. 4' s, Republican Form of Government Guarantee. Rather, Applicants believe a doctrinally correct understanding of the issue involves a more narrow tailoring of this Court's remedial decree to comport with the 14th Amendment Due Process guarantee.

CONCLUSION AND RELIEF REQUESTED

In conclusion, Applicants recognize the difficulty and complexity of the issues in this case. They applaud the plaintiffs/appellees and this Court's courageous and compassionate attempt to forge new legal doctrines to reform the state's system of funding public education.

Applicants also are sensitive to their brethren in other school districts across the state and appreciate that, like Applicants, they too are motivated by the most powerful and enduring force: the love of their children.

That having been said, Applicants are threatened by SB549. The State foists too great a burden on Applicants without an adequate corollary benefit, and in doing so, violates Applicants' fundamental rights. As a consequence, Applicants are entitled to intervene to assert their constitutional claims and protect their rights. Applicants bring to the table a reasoned, proportionate, and fair resolution of the constitutional issues in this appeal.

For the reasons stated herein, Applicants request the following relief:

1. Grant Applicants' Motion For Leave to Intervene for the purpose of making arguments advocating the following remedies:

a. Enjoin the cap on the local option budget;

b. Mandate distribution of funding for the At-Risk Non-Proficient category at the same level as regular "At-Risk" category;

c. Enjoin the one (1) year sunset on At-Risk Non-Proficient category;

d. Enjoin application of the Low Enrollment Weighting for Base State Aid Funding so that the total funding to High Enrollment School Districts increases; and Dissolve the Court's stay of the Cost of Living Weight and Mandate it be immediately funded at the level recommended by the Legislative Post Audit Report; *i.e.*, $41.8 million.

2. Order Responses to Applicants' Constitutional Arguments by June 19, 2006;

3. Permit Applicants to present an oral argument at the June 22, 2006, 9:30 a.m. hearing in this matter;

In the alternative, Applicants request that the Court:

1. Allow the first year of S.B. 549's three (3) year plan to take effect, but retain jurisdiction and order a regular briefing schedule on the constitutionality of the balance of S.B. 549 and the related constitutional claims addressed in this Motion and in other briefing filed with this Court; so that, full and complete relief can be achieved consistent with the federal and state constitutions; and

2. Dissolve the July 8, 2005 Stay of the local funding provision known as the Cost of Living Weight and allow it to take immediate effect.